

COMMITTEE ON MANDATORY FEE ARBITRATION

ARBITRATOR TRAINING

OUTLINE

I. Introductions

II. Program Overview and Relationship between State Bar and Local Bar Programs

- A. Under Bus. & Prof. Code §6200, effective 1979, the State Bar is required to arbitrate fee disputes.
 - 1. Attorney must give client notice of right to arbitration on State Bar approved form, available from local programs or State Bar website(www.calbar.ca.gov), before suing client for fees.
 - 2. Client's right to arbitrate is waived if client (a) fails to request arbitration within thirty days of receipt of notice, Bus. & Prof. Code § 6201(a), (b) commences an action or files any pleading seeking judicial resolution of fee dispute or affirmative relief for malpractice, Bus. & Prof. Code § 6201(d), or (c) answers a complaint in the attorney's civil action for fees, Bus. & Prof. Code § 6201(b).
 - 3. Attorney and client may stipulate to arbitration after the client's waiver, Bus. & Prof. Code § 6201(e)..
 - 4. Once arbitration is requested by the client, any filed action or other proceeding (including small claims court actions and other types of arbitration) commenced by the attorney are automatically stayed, with limited exceptions, e.g. writs of attachment and other provisional remedies, see Code of Civ. Proc. § 1281.8.
- B. The State Bar delegates the responsibility for fee arbitrations to local bar association programs to the maximum possible extent. The State Bar Committee on Mandatory Fee Arbitration, established in 1984, oversees attorney fee arbitration programs. Local bar arbitration programs must ensure that their rules of procedure comply with the "Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs"
- C. The local bar rules of procedure, which vary, are approved by State Bar Board of Governors, entitling the local bar program to rely on the statutory immunity provision set forth in Bus. & Prof. Code § 6200(f).
 - 1. Arbitrator, mediator, program, directors and program staff have same immunity which attaches in judicial proceedings.

2. Includes immunity from liability for damages, from testifying in most proceedings, from being sanctioned by the court.

D. Local bar arbitration programs have primary jurisdiction. State Bar arbitration program used only if:

1. No local bar program exists;
2. Matter not within jurisdiction of local bar program; or
3. Either party claims that he or she will not obtain a fair hearing under local bar program. Note: party may request removal to the State Bar from the local bar program based on a claim of unfairness at any time. Arbitration proceedings are stayed until there is a ruling on the removal request by the State Bar.

F. In 2001, there were approximately 2,500 arbitrations statewide, 142 of which were handled by the State Bar program.

G. State Bar, under Bus. & Prof. Code § 6203(d), has exclusive authority to assist clients with enforcement of a final award rendered by any approved fee arbitration program if client awarded a refund and attorney refuses to comply.

1. State Bar has authority to assess administrative penalties and place an attorney on inactive status for non-compliance.
2. To avoid inactive status, attorney must show either:
 - a. Compliance with the award;
 - b. That he is not responsible for payment of the award; or
 - c. Financial inability to pay the award.
3. Approximately 65 requests for enforcement of arbitration awards were pending in 2002. In 2001, the State Bar filed 15 motions to enroll attorneys involuntarily inactive for noncompliance.

H. Mediation.

1. Since 1995, local bar programs and the State Bar may offer fee mediation services under approved minimum standards through the MFA program.
2. Many of the larger local bar programs have active mediation programs.

III. Considerations Before the Hearing and for Commencing the Hearing

A. Skit No. 1.

B. Arbitrator Selection.

1. Notice of appointment generally served by program, with no arbitrator background. Parties may request arbitrator to provide his/her resume.

2. Client may request that attorney arbitrator on panel practice in area of either criminal or civil law depending on nature of client's underlying case. Bus. & Prof. Code §6200(e).

C. Appearance of bias.

1. Avoiding the appearance of bias is as important as recusal for actual bias.

a. Both parties may believe the program to be biased against them.

b. If clear appearance of bias exists, do not accept case.

c. If case is accepted and then something is discovered suggesting grounds for recusal or appearance of bias, send it back.

d. If unsure whether there is a problem, call local program staff.

2. If appearance of bias could be an issue, even if arbitrator believes that he or she will still be fair, the better rule is to disclose (see Arbitration Advisories No. 97-01 dated July 18, 1997, No. 94-01 dated January 7, 1994, and No. 94-03 dated July 15, 1994).

a. Disclosure should be early on in case and in writing to all parties with copy to program.

b. Give parties an opportunity to disqualify.

c. If disclosure made at hearing, consider continuing the hearing to give parties a chance to think about it, particularly if there is a pro per client.

3. One ground for vacation of an award is if the arbitrator "was subject to disqualification upon grounds specified in Code of Civ. Proc. section 1281.91, but failed upon receipt of timely demand to disqualify himself..." Code of Civ. Proc. §1286.2(a).

- a. Code of Civil Procedure §1281.91(d) requires arbitrators to disqualify themselves on “any ground specified in Section 170.1 ” for disqualification of a judge.
- b. Code of Civil Procedure §170.1 requires disqualification if:
 - i) “The [arbitrator] has personal knowledge of disputed evidentiary facts concerning the proceeding”;
 - ii) “The [arbitrator] served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding upon any matter involved in the action or proceeding”;
 - iii) “The [arbitrator] has a financial interest in the subject matter in a proceeding or in a party to the proceeding”;
 - iv) “The [arbitrator], or the spouse of the [arbitrator], or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party”;
 - v) “A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the [arbitrator] or the [arbitrator’s] spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding”;
 - vi) “For any reason (A) the [arbitrator] believes his or her recusal would further the interests of justice, (B) the [arbitrator] believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the [arbitrator] would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification”;
 - vii) “By reason of permanent or temporary physical impairment, the [arbitrator] is unable to properly perceive the evidence or is unable to properly conduct the proceeding.”
4. Recent legislation, effective July 1, 2002, requiring written disclosures by private contractual arbitrators [Code of Civ. Proc. §1281.85] does not apply to MFA attorney-client fee arbitrations, under the interpretive rules established by the Judicial Council.

D. Preparation for the Hearing.

1. Identifying the parties. The parties are the petitioner (usually the Client) and the respondent (usually the Attorney.) The parties are identified as such in the package you receive from the program administrator. If there are questions as to who are proper parties, discuss them with the administrator. For example, an insurance company paying the fees of “Cumis” counsel for the insured is not a proper party in a MFA fee arbitration challenging Cumis counsel’s fees. Under *National Union Fire Insurance Company of Pittsburgh v. Stites*, (1991) 235 Cal. App.3d 1718, “arbitration pursuant to section 6200 et seq. is limited to fee disputes between attorneys and their clients.” Contrast this with *Wager v. Mirzayance*, (1998) 67 Cal. App. 4th 1187 which held that a father who retained an attorney to defend his son was entitled to notice of client’s right to arbitrate and to participate in arbitration, even though the father was an account debtor rather than a client.
2. Setting the hearing date and notice of hearing. Many programs have local rules with guidelines for the time periods within which hearings should be set and conducted. Within such rules, try to contact the parties for mutually convenient hearing dates and times. Arbitrators often set hearings in the late afternoon to fit the working schedules of the parties (and the arbitrator). It is good practice to send a letter or fax to both parties, with available dates and times, asking for their preferences and stating that, unless you receive an objection to any of the dates within a set time, you will set the hearing for one of those dates.
3. Taking control of the proceedings from the outset. This is also a good time to ask the parties, if they have not already done so, to furnish you with the fee agreement, billing statements (if they are in issue), any other documents they may wish to rely on at the hearing, and any documents you would like to see. Tell each side to send the other side a copy of everything sent to you.
4. Shaping the issues. Read the petition, response and any accompanying materials as soon as you receive them. If you still do not have a good sense of what the dispute is about (e.g. is the client claiming that the attorney did not send bills, the bills were hard to decipher, the attorney charged more than a promised cap on fees, the attorney was inefficient or ineffective, the attorney failed to refund unearned fees), take the initiative now to ask the parties for clarification. Do not wait until the hearing to learn the nature of the dispute.
5. Sending a letter to the parties regarding timing of briefs and encouraging exchanges of evidence and documents. If the complexity of the case merits it, consider establishing target dates for submission and exchange

of written statements setting forth each party's position and anticipated evidence, and for the exchange of such evidence before the hearing.

6. Continuances. Most program rules contain policies on continuances. Usually, granting a continuance is within the arbitrator's discretion. It is good practice to ask the party seeking the continuance to clear the continued date with the other side first. After the date has been cleared, the arbitrator should notify all parties of the continuance in writing.

E. Ex Parte communications.

1. Ex parte communications create suspicion and should be avoided. See generally State Bar Rules of Professional Conduct, Rule 5-300(B).
2. No ex parte contact with arbitrators should be permitted except:
 - a. to schedule hearings or other administrative matters (including the issuance of subpoenas), or
 - b. in cases of emergency, or
 - c. in writing with copies to all (including arbitrating association).
3. Consider use of conference calls.
 - a. Who participates? If the entire panel and all sides are included, it's easier to arrange hearing dates and take care of other administrative pre-hearing business.
 - b. Who pays for the conference call?

F. Discovery.

1. Limitations
 - a. MFA program is intended to be speedy and to enable clients to participate without assistance of counsel. Permitting extensive discovery would be contrary to that intent.
 - b. Bus. & Prof. Code § 6200 et seq. is silent re discovery. Check the local program rules. Most programs permit no pre-hearing discovery.
 - c. Informal exchange of documents, however, should be encouraged.
2. Subpoenas
 - a. Pursuant to statutory language, arbitrators may "compel," by subpoena or subpoena duces tecum, the attendance of witnesses

and the production of relevant documents. Bus. & Prof. Code § 6200(g)(3). As a practical matter, the arbitrator issues subpoenas, but only the appropriate civil court may truly compel attendance/enforcement upon application by a party.

- b. Subpoenas or subpoenas duces tecum shall issue upon a party's request for good cause shown. Party requesting subpoenas obtain blank subpoena forms from the program. Some local programs maintain pre-signed subpoenas; others require the party to obtain the signature of the arbitrator or panel chair. Check the rules re compliance with deadlines to request subpoenas and that subpoena form complies with Code of Civil Procedure § 2065 (notice of witness' right to fee and mileage).

G. Arbitration in the absence of a panel member.

1. A party who is entitled, under the applicable local rules, to a panel of three arbitrators cannot be compelled to accept a panel of consisting of less.
2. Bus. & Prof. Code § 6200(e) provides for one or three arbitrators (and requires one non-lawyer arbitrator on a 3-member panel), thus impliedly prohibiting a two-arbitrator panel. Many local program rules explicitly prohibit the hearing from going forward with two arbitrators.
3. If parties agree **in writing**, hearing may proceed with panel chair acting as sole arbitrator, who must be an attorney.
4. No matter what the parties may agree or the local rules permit, it is usually better to continue the hearing until all three arbitrators can attend. Otherwise, a party, particularly an unrepresented client, may claim to have felt coerced into proceeding with one arbitrator.

H. Role of the non-lawyer arbitrator.

1. A 3-member panel must include one "lay member." Bus. & Prof. Code § 6200(e)(1). What counts as "lay" (paralegal?, insurance adjuster with law degree? inactive retired judge?) depends on local program rules.
2. Lay arbitrator is not a "party arbitrator" (as often seen in medical malpractice and international commercial arbitrations) and should be neutral, just like the other two arbitrators.
3. Purposes of non-lawyer arbitrator include providing comfort level for client, who may be intimidated by, or skeptical of, proceeding in which all arbitrators are attorneys, and the client's perspective to

circumstances surrounding fee dispute.

4. Lawyer arbitrators should always behave respectfully towards lay arbitrator.

I. Informality of the proceeding /Use of legal terminology.

1. Fee arbitration hearings should be much less formal than judicial trials, and probably less formal than judicial arbitrations or small claims hearings.
2. The level of formality to be observed is up to the arbitrator. Arbitrators should keep in mind the statutory purpose of providing a forum where clients can present their cases without legal representation.
3. Nonetheless, some level of formality helps the arbitrator to maintain control, and shows both sides they are playing by the same rules; and excessive informality may be perceived as bias, particularly by un-represented clients.
4. The location should be the arbitrator's office or other neutral place -- never the attorney's office. Consideration should be given to the participants' comfort (privacy, refreshments, space, etc.). Don't have the parties wait in the same reception area; there is often considerable hostility between them.
5. The fee arbitration program is designed so that clients can arbitrate without legal training or the assistance of counsel. Client may be intimidated by use of legal terminology and may be afraid to ask for clarification.
6. A client who doesn't understand the proceeding may believe there was bias and may be dissatisfied with the process.

J. Confidentiality of hearing.

1. Bus. & Prof. Code § 6202 makes the attorney/client and work product privileges inapplicable in the arbitration (and in related proceedings, e.g. trial de novo, petition to confirm award). Disclosures at arbitration don't waive the privilege for other purposes.
2. Some local rules permit client to bring another person to hearing for advice or support, and may give arbitrator discretion to permit additional people. Distinguish support person from non-attorney advocate, which may raise issue of unauthorized practice of law.
3. Otherwise, arbitration hearings are confidential and closed, except for witnesses when testifying.

4. Local bar rules may permit interpreters and certified shorthand reporters to attend the hearing at the requesting party's expense.

IV. The Arbitration Hearing

A Skit No. 2.

B. Agreements to be bound.

1. Fee arbitration is not binding--that is, all parties have an unconditional right to trial de novo unless, after the dispute arises, they execute a written agreement to be bound. Thus, a "binding arbitration" clause in a retainer agreement, signed before the dispute arose, is unenforceable. Bus. & Prof. Code §6204(a).
 - a. Exception: A party who wilfully fails to appear at the arbitration hearing loses the right to trial de novo. Bus. & Prof. Code § 6204(a). Since court determines issue of wilful nonappearance, it is important that the arbitration award address the circumstances of a party's nonappearance in sufficient detail.
2. Any agreement to be bound must be in writing and must have been made after the dispute arose. Usually this will occur when the parties complete the arbitration request and reply forms. Also, program may include, with the arbitrator package, a form for parties to document an agreement to be bound if they do so agree at the hearing location before the taking of evidence begins.
3. Arbitrators must ascertain, before the taking of evidence begins, whether the arbitration is to be binding.
4. Arbitrators should be wary of allowing parties to agree to binding arbitration after taking of evidence begins. See local rules for any restrictions.
5. Once both parties have agreed to be bound, neither can withdraw from the agreement.
6. Unless the parties settle or agree to withdraw from binding arbitration, neither party can withdraw from arbitration after both parties have agreed to be bound.
7. Most non-binding arbitrations become binding automatically with the passage of time because many parties do not file for a trial de novo.
 - a. Arbitrators should take the same care with non-binding

proceedings as with binding ones.

- b. If parties believe that they have been treated fairly and understand (even if they do not agree with) the reasons for the decision, they are less likely to request a new trial.

C. Oaths or affirmations of witnesses.

1. Bus. & Prof. Code § 6200(g)(2) provides that arbitrators “may” administer oaths and affirmations.
2. Many local program rules require that testimony of witnesses be given under oath, administered by panel.
3. Oath should be similar to oaths given in court, e.g. “Do you swear (or affirm) that the testimony you give in this proceeding will be the truth, the whole truth, and nothing but the truth?”
4. Many local program rules permit testimony to be submitted by declaration. Some programs require trial by declaration when the amount in dispute is small.

D. Order of proceeding and burden of proof.

1. Local rules usually provide no specific guidance; the issue of who has the burden of proof is left to the discretion of the arbitrator. (See Arbitration Advisory No. 96-03 dated June 7, 1996).
2. No need to follow formalistic rules used at civil trials.
3. At the outset of the hearing (if not before), have the parties articulate the points of contention and agreement.
 - a. A few leading questions from the panel can save a lot of time and narrow the issues.
 - i) “Do you all concede that there was no written fee agreement?”
 - ii) “Mr. Client, are you telling us that you do not disagree with the time shown on Ms. Attorney’s billings but believe that some of the time was not well spent?”
 - b. Be careful to explain that you are just narrowing the issues at this preliminary point and that you do not need a further response once you ascertain whether there is agreement on an issue.
4. Even though the client is usually the petitioner and the attorney is the respondent, most arbitrators require the party best able to produce

evidence on a given issue to present that evidence and bear the burden of proof on it.

- a. If the client raises an issue as to whether the attorney performed, the attorney should generally bear the burden of establishing his or her performance.
- b. Similarly, most arbitrators expect the attorney to establish what the agreement was (if any) between the parties and will hold the attorney responsible for not having an agreement or not being able to establish its content.
- c. If the issue is one of non-credit for payments made, the client should generally bear the burden of establishing payment.

E. Evidence.

1. Stipulations and admissions are encouraged.
2. Hearsay is permitted (see e.g., Code of Civ. Proc. §1282.2(d)).
3. Decision will be based on preponderance of the evidence.
4. Any evidence may be considered if it is of the type and character upon which ordinary people may rely in the ordinary course of serious affairs, regardless of the existence of any common law or statutory rules to the contrary.
5. Parties may waive personal appearance and submit testimony and exhibits by declaration under penalty of perjury.
6. Consider background, experience and relative sophistication of parties. In some cases, a party (especially likely to be the client) may be so unfamiliar with, or intimidated by, the proceedings that it affects that party's ability to provide meaningful evidence. Arbitrators should make every effort to make a full and fair review of the facts.
7. Frequent ground for challenge of arbitration award is failure to accept relevant evidence.
8. Factors which may have a bearing on determination of dispute re: attorney's obligations include:
 - a. Attorney's understanding of extent of legal knowledge or experience of client;

- b. Whether ramifications of fee agreement or other documents to be signed by client were fully explained;
 - c. Whether itemized bill or written or oral explanation of charges given if requested;
 - d. Whether billings represent time reasonably spent on behalf of client, or reasonably necessary to achieve client's objectives;
 - e. Whether billings reflect charges which exceed maximum agreed by parties, and whether there was consent to additional charges.
9. Client's conduct may also be taken into consideration:
- a. Whether client fully informed attorney as to facts which might affect outcome of case, or extent of fee to be charged.
 - b. Whether client sufficiently informed attorney of client's ability to pay.
 - c. Whether client made reasonable efforts to communicate with attorney about fee dispute, or amount of charges being incurred.
 - d. Whether client requested services beyond scope of fee estimate originally provided by attorney.
10. Attorney/client and work product privileges do not prohibit disclosure of relevant communications or work product in fee arbitrations; such disclosure does not constitute waiver for any other purpose. Bus. & Prof. Code § 6202.
11. Exhibits and documents should be returned to parties who submitted them following submission of award. Handwritten notes or other materials prepared by any arbitrator for use in the hearing are to remain with the arbitrator or be destroyed.

F. Arbitration with and without a written fee agreement.

- 1. Is there an enforceable written agreement?
 - a. Legislation requiring a written fee agreement will invalidate any agreements not in writing and will make non-complying written agreements *voidable*.
 - i) Bus. & Prof. Code § 6147 generally requires a written fee agreement where the attorney represents the client on a contingent fee basis.
 - ii) Bus. & Prof. Code § 6148 requires a written fee agree-

ment in certain cases not coming within § 6147 where fees are expected to be more than \$1000, with specified exceptions including when services rendered in an emergency, when an agreement is implied because similar services were previously rendered to and paid for by the client, and when the client is a corporation.

- iii) Bus. & Prof. Code § 6146 prescribes terms for retainer agreements in medical malpractice cases, limiting fees.
- iv) All three sections set specific requirements as to the content of the fee agreement and some of the procedures for the execution of the agreement.
- v) Sections 6147 and 6148 provide that a non-complying agreement is voidable at the option of the client, and the attorney is entitled to collect a reasonable fee.
- vi) In September 1999, the Bar Association of San Francisco issued Opinion Number 1999-1, which suggests that a fee agreement for both an hourly rate and a contingent fee may be permissible.

b. The State Bar Rules of Professional Conduct provide assistance in judging the validity of a written fee agreement.

- i) Attorneys “shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Rule 4-200(A).

- (a) “Unconscionability” is generally determined based upon the facts and circumstances existing when the agreement was made. Rule 4-200(B).

- (b) Rule 4-200(B) (1) - (11) sets forth factors to be considered in determining unconscionability.

- ii) A fee agreement providing for what has been called a “true” or “classic” retainer, which characterizes a payment as a “nonrefundable” fee or one “earned upon receipt,” is enforceable only if the client has agreed that the amount was paid “solely for the purpose of ensuring the

availability

of the member.” *Baranowski v. State Bar*, (1979) 24 Cal. 3d 153. Otherwise it is governed by Rule 3-700(D)(2), which requires that the attorney “[p]romptly refund any part of a fee paid in advance that has not been earned.” See Arbitration Advisory 01-02, dated May 16, 2001.

- iii) Fee agreements should be fair and reasonable and drafted in a manner which will be easily understood by the client. *Alderman v. Hamilton*, (1988) 205 Cal. App.3d 1033 1037.
 - c. To assess the enforceability of a written fee agreement, Arbitration Advisory No. 93-02 dated November 23, 1993 suggests the following approach:
 - i) Begin with the contract formation issues, i.e. is the agreement valid and enforceable taking into account the usual contract considerations and the specific legislative requirements, if applicable to the attorney/client agreement?
 - ii) If it is otherwise valid and enforceable, are its terms, under the guidelines of Rule 4-200, “unconscionable?”
 - iii) Was the attorney’s performance under the agreement reasonable?
- 2. If there is no written fee agreement or if the written agreement is unenforceable, the attorney is generally entitled to a reasonable fee.
 - a. See Arbitration Advisory No. 98-03 dated June 23, 1998 for a comprehensive discussion of procedures to determine a reasonable fee.
 - b. In determining a reasonable fee, the criteria set forth in Rule 4-200(B) are the generally accepted criteria but the standard for their application is lower (e.g., a fee of \$750 per hour may not be “unconscionable” when applying the criteria of Rule 4-200(B), but may well be viewed as “unreasonable” and reduced accordingly).
 - d. For additional materials regarding the determination of a reasonable fee, see A.B.A. Code DR 2-106(B); *Glendora Community Redev. Agency v. Demeter* (1984) 155 Cal.App.3d 465, 474; *Stokus v. Marsh*, (1990) 217 Cal.App.3d 647; *Bruckman v. Parliament Escrow Corp.*, (1987) 190 Cal.App.3d 1051, 1062.

G. Voiding the fee agreement.

- 1. The failure of the attorney to enter into a proper written fee agreement may leave the client free to void the agreement. If the client exercises that option, the attorney is entitled to a reasonable fee only.
 - a. In practice, the more difficult issue can be whether an arbitrator, in the absence of any expression by the client, should raise the possibility that the agreement may not comply with the statute.

- b. Some arbitrators will not void the agreement unless the client affirmatively raises the issue. Others will simply deem the client to have elected to void the agreement if to do so would result in a lesser fee. Many arbitrators will bring the issue to the attention of the client, particularly if the client is not represented by counsel. See Arbitration Advisory No. 96-04 dated September 13, 1996.
- c. In dealing with this issue, the following additional considerations may be relevant:
 - i) A court may well raise sua sponte issues of illegality.
 - ii) Civil Code § 1608--contracts for illegal consideration are void.
 - iii) Civil Code § 1598--contracts which are wholly for an unlawful object are void.
 - iv) Civil Code § 1599-- contracts which have several objects are void as to the unlawful portion, e.g. separate out usurious interest from balance due on principal.

H. Requirements for billing statements.

- 1. Governed by Bus. & Prof. Code § 6148(b). “All bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include the amount, rate, basis for calculation, or other method of determination of the attorney’s fees and costs.” *Ibid*. See Arbitration Advisory No. 95-02 dated June 9, 1995.
- 2. Bills for costs and expenses shall clearly identify nature and amount of costs and expenses incurred.
- 3. Bills must be provided to client no later than 10 days after client’s request; but client entitled to make such request no more than once every 30 days.
- 4. Failure to comply with these requirements renders fee agreement voidable at client’s option. If option exercised, attorney eligible to receive a reasonable fee. Bus. & Prof. Code § 6148(c).

I. Arbitration where there is malpractice or professional misconduct.

- 1. Evidence relating to claims of malpractice and professional misconduct shall be admissible only to the extent that those claims bear upon the fees or costs to which the attorney is entitled. Bus. & Prof. Code § 6203(a).

- a. Arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying any such claim. Bus. & Prof. Code §§ 6203(a) & 6200(b)(2).
 - b. Arbitrators may rule that the value of attorney's services was lessened due to the way the case was handled, and reduce fee. *Id.*
- 2. Conflicts of interest and other ethical violations.
 - a. Occasionally, an arbitration will reveal that the attorney undertook to represent the client under an impermissible conflict of interest or committed some other ethical violation. See California Rules of Professional Conduct, Rules 3-300, 3-310 & 3-600. See also Arbitration Advisory No. 98-03 dated June 23, 1998.
 - b. California law suggests there must be a serious violation of the attorney's responsibilities before an attorney who violates an ethical rule is required to forfeit fees. See *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000.
 - c. Care is required, however, for even severe ethical violations sufficient to invalidate a written fee arrangement may still not preclude fee recovery on a theory of quantum meruit or unjust enrichment. See *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1; *Estate of Falco*, (1987) 188 Cal.App.3d 1004; *Kallen v. Delug*, (1984) 157 Cal.App.3d 940.
 - d. The apparent rule is that the attorney may be entitled to keep fees earned before the conflict arose but must disgorge all fees charged and paid after the violation occurred. See e.g. *David Welch Co. v. Erskine & Tully*, (1988) 203 Cal.App.3d 884.

J. Court Ordered Fees.

- 1. Bus. & Prof. Code § 6200(b) provides that there is no jurisdiction to arbitrate fees paid where the fee "has been determined pursuant to statute or court order."
- 2. The problem arises when attorneys' fees have been assessed by a court against one side in litigation, such as under Civil Code §1717, but there has been no determination of the reasonableness of the fee as between the attorney and the recipient client.
- 3.. In the absence of a court order arising from a proceeding where the client had a fair opportunity to contest the fee owing to his own counsel, the dispute is subject to mandatory fee arbitration. See Arbitration Advisory No. 94-02 dated April 22, 1994.

K. Statute of Limitations as a Defense.

1. See Arbitration Advisories No. 96-02 dated June 7, 1996 and 98-01 dated January 16, 1998.
2. Although Code of Civ. Proc. §340.6 [statute of limitations on attorney malpractice] may seem to apply, it does not because it deals with claims of professional negligence not fee disputes.
3. Bus. & Prof. Code § 6201(c) allows an automatic stay of any civil suit brought by an attorney if the client elects to arbitrate under the MFA program.
4. Bus. & Prof. § 6206 tolls any applicable statute of limitations while an MFA arbitration is being conducted.
5. Nevertheless, an MFA arbitration remains subject to any applicable statute of limitations such as Code of Civ. Proc. §339 (two years on an oral contract) or Code of Civ. Proc. §337 (four years on a written contract, book account or account stated).
6. Occasionally, Code of Civ. Proc. §352.1 may apply. It states that if a person with a fee dispute is incarcerated when the cause of action accrued, the time of that “disability” is added to the applicable limitations period, “not to exceed two years.”

L. Effect on Mandatory Fee Arbitration of private arbitration clause in fee agreement.

1. Amendments to Bus. & Prof. Code §§ 6200 & 6204(a) have extended the right to arbitration and automatic stay provisions of the Bus. & Prof. Code to fee disputes where there is a written and otherwise enforceable arbitration clause in the retainer agreement. See Arbitration Advisory 98-01 dated January 16, 1998.
 - a. A client may elect to stay an arbitration proceeding involving fees which has been initiated in another forum if a timely request is made for Mandatory Fee Arbitration, Bus. & Prof. Code §§ 6201(a) & (b).
 - b. An agreement that the arbitration award will be binding is effective only if made ***after the dispute over fees and/or costs has arisen***. Bus. & Prof. Code § 6204(a).
2. Thus, where there is a binding arbitration clause in the fee agreement, the client may elect to proceed under the Mandatory Fee Arbitration statute with right of court trial *de novo*, or agree after the dispute has arisen to waive that right and to proceed with the binding private contractual arbitration. *Alternative Systems, Inc. v. Carey*, (1998) 67 Cal.App.4th

M. Sanctions Against a Party

1. See Arbitration Advisory No. 02-01 dated May 17, 2002.
2. Monetary sanctions for misconduct or egregious behavior of a party are not authorized or permissible.
3. As a last resort to achieve fairness at the hearing, procedural sanctions, such as exclusion of evidence for wilful failure to comply with pre-hearing requirement to exchange documents, may be appropriate. In contrast, sanctions such as basing the decision on a party's conduct at the hearing or exclusion of a party from testifying are not authorized or permissible.

V. Recent Developments

VI. After the Hearing

- A. Skit No.3.
- B. Required award form.
 1. Specific form required (see generally, Checklist for Preparation of Award).
 2. Necessary for enforcement purposes. It must be clear who is to pay and how much.
 3. Form should be filled out completely and correctly. Make sure amounts add up and that they are consistent with information provided in the client's request. If amounts different, explain why in the "determination of questions submitted."
 4. Determination of questions submitted.
 - a. Very important to use this section to give the reasons for the decision.
 - b. Bus. & Prof. Code § 6203 requires arbitrators to include "a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy."
 - c. There should always be something in this section, even if only a

short statement that there was a written fee agreement, the rate was not unconscionable and the services performed were reasonable and necessary.

- d. If the attorney's fees are reduced, there should be a specific explanation of why the arbitrator did this. It may be helpful for future attorney/client relationships if the attorney knows why the arbitrator took a particular action.
- e. If the arbitrator is awarding interest, the rate and basis of calculation should be included here.

C. Responsible attorney.

- 1. Bus. & Prof. Code § 6203(d)) provides for possible administrative sanctions against an attorney, including involuntary inactive enrollment, for failing to comply with an award for a refund to a client of fees or costs previously paid.
- 2. Penalties and inactive enrollment cannot be applied to a law firm, only to individual attorneys.
- 3. Penalties may only be applied to an attorney who is "personally responsible for making or ensuring payment of the award." Bus. & Prof. Code § 6203(d)(2)(B). Arbitration Advisory No. 94-04 dated August 19, 1994 gives guidance as to which attorney in a firm is the "responsible attorney."
 - a. There is an obvious need for specific and closely written determinations in the Award identifying the responsible attorney.
- 4.. If parties understand the basis of the award, even if they do not agree with it, they will be less likely to ask for a new trial or for correction or vacation of the award. This is particularly important in non-binding matters.

D. Use of findings.

- 1. Findings of fact, while not specifically required, may be helpful to parties in determining whether or not to seek judicial relief after arbitration.
- 2. The award should include findings as to the willfulness of a party's non-attendance at the hearing.
 - a. Willful non-attendance precludes that party's right to a trial de novo after arbitration. Bus. & Prof. Code § 6204.
 - b. Only a court can make a final determination of willfulness. But, in making the determination, the court may consider the

arbitrators' findings on the subject of a party's failure to appear.

3. With very limited exceptions, such determinations may not operate as res judicata or collateral estoppel in any action or proceeding. Bus. & Prof Code § 6204(e).

E. Allocation of costs.

1. Recovery of filing fee may be allocated between parties. Bus. & Prof Code § 6203(a). Such allocation should be specifically detailed in award so that parties can determine precise amount of filing fee to be remitted to the appropriate party.
 - a. Consider assessing filing fee against respondent party payable to the program if petitioner obtained a fee waiver if circumstances warrant.
2. Attorney's fees and other costs. The award shall not include any award to either party for costs or attorney's fees incurred in preparation for or in the course of the arbitration proceeding, notwithstanding any contract between the parties providing for such award of costs or attorney's fees. Bus. & Prof. Code § 6203(a).

F. Interest.

1. See Arbitration Advisory No. 93-01 dated July 30, 1993.
2. Interest can be awarded as part of an arbitration award.
3. Interest is a common element of recovery in contract disputes:

“The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon.” Civil Code § 3302 (emphasis added).
4. Where the recovery is for a reasonable fee on a quantum meruit basis, the result is less certain due to the requirement that pre-award interest can only be awarded to one who is entitled to recover damages certain, or capable of being made certain by calculation. Civil Code § 3287.
5. If there is an agreement to charge interest, compliance with COPRAC Formal Opinion 1980-53 should be ascertained before it is enforced.
6. If there is an enforceable written contract, and the rate is not usurious, it should be charged. Civil Code § 3289(a).
 - a. Attorney - client fee agreements can be subject to a wide range of state and federal regulation. See Arbitration Advisory No. 00-01 dated May 31, 2001 for a discussion of the applicability of Truth In Lending and Unruh Act.

4. The dissent must be filed within the same time required for the filing of the award.

J. Settlement prior to award.

1. A difficult problem facing the arbitrator is to what extent the arbitrator should encourage or become involved in communications between the parties regarding settlement. See Arbitration Advisory No. 96-05 dated December 13, 1996.
2. Effect of settlement on enforcement of award.
 - a. Under Bus. & Prof. Code § 6203(d), State Bar can enforce an **award** when a client is given a refund. See paragraph 3.b below re stipulated award.
 - b. If settled without an award and settlement includes a refund to the client, client has no recourse. Nor do the parties have the other post-arbitration remedies available under the Business and Professions Code.
3. Role of the arbitrator.
 - a. The arbitrator is not a mediator. If parties wish to settle, they should do so outside the arbitrator's presence.
 - i) Potential loss of immunity if arbitrator tries to mediate.
 - ii) If mediation unsuccessful, parties, particularly the unrepresented client, will be more inclined to believe there was bias if they lose.
 - b. Arbitrator may draft a stipulated award.
 - i) This gives the parties their rights under Bus. & Prof. Code § 6200 et seq., including enforcement of the award.
 - ii) If doing so, the arbitrator should be comfortable that the agreement is fair.
 - iii) If uncomfortable with the proposed agreement, the arbitrator has the option of hearing the matter and issuing an award. But in no event should the arbitrator memorialize an agreement that appears unfair, unethical or illegal.
 - iv) Arbitrator may explain to the parties that a settlement agreement that has not been set forth in a stipulated award does not entitle the parties to the post-arbitration

procedures of Bus. & Prof. Code § 6200 et seq.

K. Referrals to discipline.

1. The requirement of confidentiality does not preclude referral to discipline.
 - a. Bus. & Prof. Code § 6202 provides safeguards with respect to client confidential matters involving the attorney-client and work product privileges.
 - b. The State Bar's Minimum Standards provide for confidentiality of privileged materials, but there is a specific exception for transmitting allegations of unethical conduct to the Office of the Chief Trial Counsel.
2. If arbitrators wish to make a referral, it can be done by:
 - a. Following procedure set forth in local rules, or
 - b. Writing directly to the Intake Unit of the Office of the Chief Trial Counsel (unless the local rules commit this decision to the local program chair), or
 - c. Advising fee arbitration staff who will send information on parties' and arbitrators' names and addresses, and award, if appropriate, to Intake.
3. If warranted, Office of the Chief Trial Counsel will conduct an independent investigation of the allegations.

L. Amendment/Supplementation of Awards

1. See Arbitration Advisory No. 00-01 dated November 3, 2000.
2. Amendment of award already served may be necessary to include an issue relevant to the award inadvertently omitted or to correct an error pursuant to Code Civ. Proc. § 1284. Amendment may be made upon motion by a party or sua sponte.
3. Timing: Amendment or supplementation should be made within 30 days following service of the award on the parties. Service of amended award commences new time period to request trial de novo.

VII. Questions and answers

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